No. 79-1856

In The

Supreme Court of the United States

October Term, 1979

THE EATON CORPORATION,
Petitioner,

v.

OLGA J. FOX,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

On August 30, 1972, Olga J. Fox, an employee with thirty (30) years seniority, was released from employment when the Petitioner's heater plant was closed in Cleveland, Ohio. In the course of her employment, the Respondent had been on medical leave arising out of the birth of her two children. As of the date of the dismissal, Mrs. Fox had a total of 29.5 years of credited service, according to the Petitioner's computation. On October 23, 1973, suit was filed against the Petitioner in the Court of Common

Pleas of Cuyahoga County, Ohio alleging a breach of contract. The basis of this allegation was a discriminatory computation of Mrs. Fox's credited service, the discrimination being that Mrs. Fox was penalized by company policy which required maternity leave to commence with the beginning of the fifth month and to continue until authorization to return to work was granted by the company physician.

Subsequent to the initial pleadings, an Amended Complaint was filed alleging a Title VII violation under Section 2000e-5(f)1 of Title 42 of the United States Code (Title VII of the Civil Rights Act of 1964).

At the time of the initial filing, the state and federal courts had concurrent jurisdiction in all Title VII actions and suit was filed in the state court because the parties, the contract and the alleged violation all occurred in the State of Ohio.

At trial, the Title VII jurisdiction question was stipulated by counsel and acknowledged by the trial court. The trial court entered a judgment on behalf of the Petitioner on the facts and the Respondent appealed to the Ninth District Court of Appeals for the State of Ohio. Said court affirmed the decision of the trial court. The jurisdictional question was not addressed in that opinion.

Certiorari was granted to the Supreme Court of the State of Ohio. On December 15, 1976, the Ohio Supreme Court in *Olga J. Fox v. The Eaton Corporation*, 48 Ohio St. 2d 408 (1976), invoked for the first time the question of jurisdiction and ruled that the federal courts had exclusive jurisdiction for all Title VII violations. The action of the Supreme Court, therefore, reversed the factual findings of the lower courts and dismissed the matter sua sponte otherwise than on the merits. Respondent then

refiled her Title VII action in the Federal District Court for the Northern District of Ohio alleging essentially the same Title VII violations as had been pled in the state court. The Petitioner filed a Motion to Dismiss on the basis that the herein action had not been filed in the ninety (90) day provision of Section 2000e-5(f)1 of the Civil Rights Act of 1964.

Respondent argued that the dismissal by the Ohio Supreme Court was jurisdictional in nature, that the dismissal had been otherwise than on the merits, and that the ninety (90) day provision of Title VII was "tolled" during the pendency of the state action. The Motion to Dismiss was granted and the Respondent appealed to the Court of Appeals for the Sixth Circuit. On February 21, 1980, the decision of the Federal District Court was reversed and the Petitioner has now filed for a Writ of Certiorari with this Court.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THE DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT FOR THE HEREIN CASE WAS CORRECT IN THAT AT THE TIME OF THE ORIGINAL FILING, THE STATE AND FEDERAL COURTS HAD CONCURRENT JURISDICTION TO HEAR CLAIMS UNDER SECTION 2000e-5(f)1.

Respondent argues that as of the filing of the original action in the Court of Common Pleas, Cuyahoga County, Ohio, the state and federal courts both had concurrent jurisdiction to hear alleged violations under Title VII. This concurrent jurisdiction continued in the state courts of Ohio

until the decision of *Olga J. Fox v. The Eaton Corporation,* 48 Ohio St. 2d 408 (1976). To date, the United States Supreme Court has not ruled on the question of concurrent state and federal jurisdiction, the question having been argued both ways by various circuits: See *Peterson v. Eastern Airlines,* 20 FEP Cases 1322 (W.D. Texas 1979); *Bennun v. Board of Governors,* 413 F. Supp. 1274 (D.N.J. 1976); *Peper v. Princeton University Board of Trustees,* 77 N.J. 55, 389 A.2d 465 (1978); *Vason v. Carrano,* 31 Conn. Super. 338, 330 A.2d 98 (1974) (holding state courts have concurrent jurisdiction); *Dickinson v. Chrysler Corp.,* 456 F. Supp. 43 (E.D. Mich. 1978); *Fox v. Eaton Corp.,* 48 Ohio St. 2d 408 (1976); *Lucas v. Tanner Bros. Contracting Corp.,* 10 FEP Cases 1104 (Arizona 1974) (holding federal courts have exclusive jurisdiction). There is likewise no language in the statute specifically excluding jurisdiction from the state courts, *see Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962). The Respondent, therefore, argues that without a definitive jurisdictional ruling, timely filing in the state court fully met the requirements of Section 2000e-5(f)1.

II. THE DISMISSAL OF THE RESPONDENT'S CLAIM BY THE OHIO SUPREME COURT ON JURISDICTIONAL GROUNDS CONSTITUTED A DISMISSAL OTHER "THAN ON THE MERITS" THEREBY TOLLING THE NINETY (90) DAY PROVISION OF SECTION 2000 OF TITLE 42 OF THE UNITED STATES CODE.

Respondent argues that the decision of the Ohio Supreme Court in the case of *Olga J. Fox v. The Eaton Corporation, supra,* raised for the first time the jurisdictional question in the Ohio courts. Since the ninety (90) day provision of Title VII was met in the state court, its validity remained in effect until the jurisdictional ruling by the

Ohio Supreme Court on December 15, 1976. It is also argued that since concurrent jurisdiction between the state and federal courts existed until the decision of the Ohio Supreme Court in *Fox v. The Eaton Corporation, supra,* the requirement of timely filing "the ninety (90) day provision" had been met. This is in compliance with a similiar set of circumstances, *see Bethel v. Jefferson,* 589 F.2d 631 (D.C. Cir. 1978). This in effect tolled the statute during the state court action and the dismissal by the Supreme Court sua sponte otherwise than on the merits permitted a timely filing in the Federal District Court.

III. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IN THE INSTANT CASE HAS LIMITED AND SINGULAR APPLICATION TO THE CASE AT POINT.

Respondent argues that the decision of the Sixth Circuit Court of Appeals in the herein case has extremely narrow, singular, and limited application. The application to other cases involving the tolling doctrine would be severely restricted by the facts involved.

CONCLUSION

Respondent argues that the decision of the Sixth Circuit Court of Appeals to employ the equitable tolling doctrine in the herein case was just and proper in that the case should be heard on its merits. Respondent argues that the restrictions invoked by the limited application to the facts does not make it a good candidate or vehicle in terms of either the concurrent jurisdiction question or the validity of the tolling doctrine.

For the reasons herein set forth, the Respondent respectfully moves that the Writ of Certiorari be denied.

Respectfully submitted,

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